



**TC01525**

**Appeal number: TC/2011/04414**

*Penalty; late filing; fairness; s98A(2)(a) TMA 1970. Common law fairness. Conscionable conduct. Jusilla v Finland. "Reasonable excuse" does not necessarily involve any exceptional circumstance. Honest and genuine belief amounts to "reasonable excuse" - R v Unah The Times 2/8/11 Elias LJ, Wyn Williams J & Sir David Clarke. Burden of proof.*

**FIRST-TIER TRIBUNAL**

**TAX**

**BRIDGE UTILITIES LIMITED**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: GERAINT JONES Q.C. (TRIBUNAL JUDGE)**

**The Tribunal determined the appeal on 7 October 2011 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal (undated) and HMRC's Statement of Case submitted on 28 July 2011.**

## DECISION

1. By its undated Notice of Appeal the appellant, Bridge Utilities Ltd, appeals against a penalty totalling £800 in respect of its alleged late filing of P35 (end of year return) forms for the tax year ended 5 April 2010.

2. This is an appeal in which the appellant has not admitted and does not admit that its filing was late. It puts its case on the basis that the necessary filing took place, electronically, on the 21 April 2010. The Grounds of Appeal say in terms that "*HMRC Gateway indicated it was accepted, but no e-mail response was generated. Following a penalty notice. I spoke to Tracey Buchanan at 16:52 hours on 12 October 2010. She confirmed receipt of the 2009/2010 P35/P14 electronically and stated it was logged twice but had been heated by the "IT Team" online services. She stated she would rectify the position and discharge the penalty notice.*"

3. Before I turn to the facts of this appeal and to my conclusions in respect of it, it is appropriate that I set out the law as I now perceive it to be. In G. Deacon & Sons v Commissioners of Inland Revenue 33TC 66 Mr Justice Donovan dismissed a request for a case to be stated in respect of conclusions drawn by General Commissioners, holding that from the primary facts adduced in evidence, they were entitled to draw the inferences that they drew against the then appellant, Mr Deacon.

4. In Johnson v Scott (1987) STC 476 Mr Justice Walton expressly considered where the onus of proof lay in a case where an appellant was challenging amended assessments that had been upheld by the Commissioners. He observed that counsel for the Crown had correctly accepted that where, as in that case, neglect on the part of the taxpayer had to be established, the onus of establishing such neglect lay with the Crown. He went on to hold that if a finding of neglect is made, and justified on the evidence, that enabled the Crown to make assessments for the purpose of making good any tax lost as a result of such neglect. He went on to observe that if that stage was reached, then the onus would pass to the taxpayer to adduce evidence to show that the assessment is too large.

5. His Lordship desisted from indicating whether the onus that then shifted to the taxpayer was a legal burden or an evidential burden, but usually a reference to a party then having a burden to adduce evidence, refers to an evidential rather than a legal burden. It is also relevant to observe that in that case the learned judge was considering section 50(6) of the Taxes Management Act 1970 in its original, unamended, form. The learned judge also emphasised that where the Crown's case was based upon inferences drawn from primary facts, such inferences had to be "fair" inferences. One would not have expected otherwise. The Court of Appeal upheld that judgment. It was a case in which the taxpayer failed, by adducing acceptable or probative evidence, to discharge the evidential burden upon him of showing that the inferences drawn by the Crown were not fair or appropriate.

6. I set out the foregoing because it is often stated, incorrectly, that once an assessment is raised or a surcharge demanded, the burden of proving that it is incorrect rests upon the taxpayer. That may be an approximation of the *de facto*

position in respect of an assessment (but not a surcharge or penalty) but it fails to analyse the true legal position.

7. In my judgment the true legal position now has to be considered bearing in mind the amendments to section 50 of the Taxes Management Act 1970, the most recent  
5 having come into effect on 1 April 2009, but more importantly having in mind the decision of the European Court in the **Jussila v Finland (2009) STC 29** where, in the context of default penalties and surcharges being levied against a taxpayer, the Court determined that Article 6 of the European Convention on Human Rights was applicable, as such penalties and surcharges, despite being regarded by the Finnish  
10 authorities as civil penalties, nonetheless amounted to criminal penalties despite them being levied without the involvement of a criminal court. At paragraph 31 of its judgment the court said that if the default or offence renders a person liable to a penalty which by its nature and degree of severity belongs in the general criminal sphere, article 6 ECHR is engaged. It went on to say that the relative lack of  
15 seriousness of the penalty would not divest an offence of its inherently criminal character. It specifically pointed out, at paragraph 36 in the judgment, that a tax surcharge or penalty does not fall outside article 6 ECHR.

8. This is a case involving penalties. The European Court has recognised that in certain circumstances a reversal of the burden of proof may be compatible with  
20 Article 6 ECHR, but did not go on to deal with the issue of whether a reversal of the burden of proof is compatible in a case involving penalties or surcharges. This is important because a penalty or surcharge can only be levied if there has been a relevant default. If it is for HMRC to prove that a penalty or surcharge is justified, then it follows that it must first prove the relevant default, which is the trigger for any  
25 such penalty or surcharge to be levied.

9. In my judgement there can be no good reason for there to be a reverse burden of proof in a surcharge or penalty case. A surcharge or penalty is normally levied where a specified default has taken place. The default might be the failure to file a document or category of documents or it may be a failure to pay a sum of money. In such  
30 circumstances there is no good reason why the normal position should not prevail, that is, that the person alleging the default should bear the onus of proving the allegation made. In such a case HMRC would have to prove facts within its own knowledge; not facts peculiarly within the knowledge of the taxpayer.

10. It is for HMRC to prove that a penalty is due. That involves HMRC proving, on  
35 the balance of probabilities, that the required end of year filing did not take place by 19 May 2010. HMRC has produced a Statement of Case but has not filed any evidence for the purpose of this appeal. Given the nature of the proceedings, in which HMRC bears the onus of proving that the filing did not take place on time, its failure to file evidence in support of that factual proposition, in judicial proceedings,  
40 inevitably means that it has failed to discharge the onus of proof upon it and that this appeal must succeed. In my judgment, even if the Statement of Case was to be taken as evidence HMRC has produced insufficient evidence to prove the alleged default and to rebut the clear account given by the appellant.

11. The first Penalty Notice in the sum of £400 was issued by HMRC on 27 September 2010, more than four months from the alleged default date (19 May 2011). A Final Penalty Notice was issued on the 24 January 2011 in the sum of £400, the initial Penalty Notice having been in the sum of £400.

5 12. HMRC has put forward no explanation whatsoever for its failure to send out a First Penalty Notice within a reasonable time of the alleged default being known about on the 20 May 2010.

10 13. I am entitled to take judicial notice (based upon experience of sitting in a specialist Tribunal) of the fact that where a taxpayer defaults in sending in a VAT return on time, or defaults in paying the amount of VAT due on time, a Default Notice or Surcharge Notice (whichever is appropriate) is usually sent out within 14 – 21 days. I can and do take judicial notice of that fact. In a VAT default case the penalty (if applicable) does not increase with the passage of time, by contrast to the penalty regime for failing to file an end of year return by the 19 May. Thus in a VAT case  
15 HMRC has no interest in delaying sending out the Penalty Notice (where applicable), as the penalty does not increase as time goes by. It may be otherwise in P35 default situations.

14. In contrast, the experience of this Tribunal is that in respect of penalties for the late filing of end of year returns, HMRC delays sending out the First Penalty Notice  
20 for 4 months or thereabouts. It gives no explanation for and has provided no justification for such tardiness. I have no doubt that Penalty Notices are computer-generated and that HMRC could, if it so wished, set its computer system to generate a Penalty Notice soon after 19 May in each year just as easily as it now sets its computer system to generate such Penalty Notices almost four months post default.  
25 In VAT default cases HMRC receives no greater monetary sum if it delays demanding the penalty and so it chooses to send them out promptly. The converse is true in a case involving the late filing of end of year returns, where the penalty increases month on month.

15. The question would thus arise in the mind of any fair-minded objective observer  
30 as to whether this is something done deliberately by HMRC so as to increase the penalty monies received in respect of P35 cases, given that additional penalties accrue whilst the default continues. In many cases the continuing default may represent no more than the sin of oversight or forgetfulness which, had a timeous First Penalty Notice been issued, would, in many cases, be remedied forthwith.

35 16. In my judgment there was conspicuous unfairness by HMRC in failing to send out a First Penalty Notice until more than four months post default. That is a serious but inevitable charge to be laid at the door of HMRC in this kind of penalty case. The appellant was not given a timeous *de facto* reminder of its default during an entire period of four during which, had an appropriately timed First Penalty Notice been sent  
40 to it, it could have remedied the alleged default (subject to what it was told by Miss Buchanan). There can be no doubt that it was the duty of HMRC to act promptly in sending out the First Penalty Notice. I find as a fact that it did not do so. I find that

the duty upon HMRC to act promptly requires it to send out a First Penalty Notice not more than 14 days after the 19 May in each year.

5 17. In my judgement the conduct of HMRC in desisting from sending out a timeous First Penalty Notice gives rise to conspicuous unfairness which would be recognised as such by any fair-minded objective observer. Such an objective observer would recognise such conspicuous unfairness being caused by HMRC choosing not to notify the appellant that it had incurred any penalty until well into September 2010. In my judgement, it was/is not the intention of Parliament, or within its contemplation based upon *s98A Taxes Management Act 1970* (and its other provisions), that HMRC would  
10 or should desist from acting timeously in issuing a first (or other) Penalty Notice.

18. A fair minded objective observer would readily identify conspicuous unfairness from the following :

15 (1) HMRC's failure to comply with the obvious intention of Parliament that where a penalty is incurred, that penalty should be promptly notified to and collected from the transgressor.

(2) The complete lack of any explanation for, or justification of, HMRC's dilatoriness in failing to send out a First Penalty Notice for four months or thereabouts.

20 (3) The fact that HMRC notifies and collects penalties or surcharges for failing to file a VAT return or failing to make a VAT payment, with expected promptness. By contrast, it shows no such inclination to act with promptitude in cases involving a penalty for failing to file end of year returns, which just happen to incur increasing penalty sums as time goes by.

25 (4) By failing to act promptly in notifying and collecting penalties due for a failure to file an end of year return on time, HMRC is thereby failing to give effect to the intention of Parliament that it should so act.

30 (5) It is an overwhelming inference that if HMRC can set its computer system to notify VAT penalties promptly, its computer system could also be persuaded to notify late filing penalties in respect of end of year returns, with equal promptness.

35 19. In this appeal the appellant also demonstrates that is, in fact, there was any default, it has a reasonable excuse respect. In my judgement given that the appellant says that further to a discussion with Tracey Buchanan (of HMRC) it was told that the position would be rectified and the penalty notice discharged, the entire period of delay (as alleged by HMRC) is entirely properly explained and arose from the fact that the appellant honestly believed that its filing had taken place and that the allegation that it had not taken place arose by reason of some kind of error on the part of HMRC (which Miss Buchanan acknowledged at the telephone).

40 20. Thus the appellant can also contend that it has a reasonable excuse for its default, if indeed any default had been proved. An honest belief that something has been done amounts to a reasonable excuse for not doing that thing again, at least until the person holding that honest belief becomes aware that the belief is not correct. In this case,

even if HMRC had proved before this Tribunal that the filing had not taken place, I would find as a fact that that the appellant did honestly believe that its filing had properly taken place. For there to be a "reasonable excuse" there are only two preconditions. They are:

- 5 (1) that the appellant puts forward an excuse, and
- (2) when viewed objectively, that excuse is properly to be characterised as reasonable.

21. The words "reasonable excuse" are not defined by the definition section of the  
10 Taxes Management Act 1970. They are words in ordinary and everyday use and must be given their natural and ordinary meaning absent Parliament specifying that they are to bear a statutorily ascribed meaning.

22. HMRC may contend that as the penalty regime is a statutory regime, this  
15 Tribunal has no jurisdiction to substitute a sum but only to uphold the penalty or set it aside (in whole or in part) in respect of any period for which a reasonable excuse is demonstrated. I recognise a further exception in law, which is that where HMRC, through its conspicuous unfairness and failure to operate the penalty regime in the manner that was and is intended by and in the contemplation of Parliament, the common law principles that I have identified above are sufficient to justify this  
20 Tribunal mitigating or setting aside part of the penalty, in appropriate factual circumstances.

23. However, on the basis that HMRC has failed to prove the alleged default, this appeal is allowed in full.

24. If HMRC had proved the alleged default, the appeal would have been allowed in  
25 full given that, in my judgement, the appellant would have demonstrated a reasonable excuse throughout the period of alleged delay, that is, an honest belief in the fact that the filing had taken place and that, after receiving the First Default Notice, HMRC by its Miss Buchanan, had acknowledged that the filing had taken place and that the penalty notice would be set aside. The Court of Appeal in *R v Unah*, *The Times* 2/8/11 (Elias LJ, Wyn Williams J & Sir David Clarke) held that an honest or genuine  
30 belief can give rise to there being a "reasonable excuse", albeit in a different context.

25. This document contains full findings of fact and reasons for the decision. Any  
35 party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

40 **Decision.**

Appeal allowed. The £800 penalty is quashed.

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**TRIBUNAL JUDGE**  
**RELEASE DATE: 27 OCTOBER 2011**

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